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IN THE

Supreme Court of the United States

October Term, 1966

No. ____

WHITEHOUSE TRUCKING, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Northern District of Ohio

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the Northern District of Ohio, entered on October 27, 1966, dismissing a complaint to set aside an order of the Interstate Commerce Commission, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the Northern District of Ohio, Western Division, is not yet reported. The opinion of the Interstate Commerce Commission is reported in 99 M.C.C. 621. Copies of the District Court's opinion and order, the opinion of the Interstate Commerce Com-

mission and the report and order recommended by the Hearing Examiner are attached hereto as Appendices A, B, and C, respectively.

JURISDICTION

This suit was brought under 28 U.S.C. Section 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on October 27, 1966, a Motion for Reconsideration was denied by an order entered December 8, 1966, and Notice of Appeal was filed in the District Court on February 6, 1967. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424; *Andrew G. Nelson, Inc.* v. *United States*, 355 U. S. 554; *American Trucking Ass'n, Inc.* v. *Frisco Transportation Co.*, 358 U. S. 133.

QUESTION PRESENTED

Where the Interstate Commerce Commission has issued a certificate of public convenience and necessity to a motor carrier which is clear and unambiguous on its face, is a later Commission order which, on the basis of subsequently adopted Commission policy, imposes additional restrictions and limitations not contained in the terms of the certificate itself a clearly erroneous order?

STATUTES INVOLVED

National Transportation Policy, Sections 204(c), 206(a)(1), 212(a)(49 U.S.C. Sections 304(c), 306(a)(1), 312(a)) of the Interstate Commerce Act, and Section 8(b) (5 U.S.C. Section 1007(b)) of the Administrative Procedure Act, are set forth in Appendix D hereto.

STATEMENT

Appellant, hereinafter referred to as Whitehouse, is primarily an interstate common carrier of prefabricated commodities by motor vehicle. Whitehouse holds a certificate of public convenience and necessity issued by the Interstate Commerce Commission, hereinafter referred to as the Commission, which authorizes the transportation, between points in designated states, of the following:

> "Prefabricated houses and buildings, prefabricated house and building sections, prefabricated house and building panels, with parts and accessories."

This grant of authority became effective January 15, 1947. On August 26, 1964, the Commission instituted an investigation to determine whether Whitehouse has been engaged in the transportation of specified commodities not authorized by the terms of its certificate.

It was and is the position of Whitehouse that the second and third portions of its certificate authorize the transportation of any prefabricated sections and panels which are intended for use in a house or building. In his Report and Recommended Order (Appendix C) the Hearing Examiner agreed with Whitehouse, finding that Whitehouse's certificate plainly and unambiguously grants authority to transport such commodities. The Commission reversed the order recommended by the Hearing Examiner and concluded that Whitehouse's certificate does not authorize the transportation of prefabricated sections and panels unless they are intended for use in *prefabricated* houses and buildings. 89 M.C.C. 621 (Appendix B).

Whitehouse petitioned for reconsideration and for a finding that an issue of general transportation importance was involved. Both petitions were denied by the Commission.

Whitehouse brought this action in the United States District Court for the Northern District of Ohio, Western Di-

vision, to review the ruling of the Commission. The District Court dismissed the complaint of Whitehouse. The Court found that the fact that the Commission's order was not in accord with the expert evidence in the record as to the meaning of the language of the certificate is not controlling because the Commission also has an expertise in interpreting the language of certificates. The Court further found that any inconsistency of the Commission's decision with prior Commission decisions was not determinative because the Commission "is not bound by *stare decisis* and inconsistency in itself is not necessarily unreasonable." The District Court did not, however, suggest any affirmative reason supporting the restrictions announced in the Commission's order.

THE QUESTION IS SUBSTANTIAL

The question involved in this appeal is of importance to the motor carrier industry and to the administration of the Interstate Commerce Act. The Act is predicated on the Congressional policy that the stability and economic strength of the motor carrier industry are best developed by the delineation of the operating rights of motor carriers through the device of issuing certificates of public convenience and necessity. This is in accord with the national transportation policy to "foster sound economic conditions in transportation and among the several carriers." (Appendix D)

In keeping with this policy, it has consistently been held that a certificate which authorizes in clear and unambiguous terms the transportation of particular commodities must be construed in accordance with its terms. The Commission's order disregards the admittedly unambiguous language of the Whitehouse certificate and superimposes an additional restriction upon the certificate. The Commission predicates its order on the premise that it may disregard

the language of the certificate in order to harmonize the certificate with the Commission's subsequently adopted policy of using the broader generic term "building materials" to include the type of commodities that are more specifically and narrowly described in the Whitehouse certificate as "prefabricated house and building sections" and "prefabricated house and building panels." * The District Court's decision and the Commission's order therein reviewed are in direct conflict with the policy underlying the certification provisions of the Act as well as the prior decisions of the Commission and of this Court.

1. The Interstate Commerce Act provides that certificates shall remain in effect until suspended, terminated, or amended in accordance with the provisions of Section 212(a). The Commission has long recognized that this rule is deeply ingrained in the policy of the Act:

> ". . . [O]nce a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. To hold that under section 208(a) we have the power to include in certificates self-executing forfeiture terms, conditions, or limitations would make section 212(a) merely surplusage

* The Commission policy of following a predetermined classification system including the generic classification "building materials" when issuing certificates was first announced in 1952, *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, while the Whitehouse certificate became effective in 1947.

Although the Commission erroneously characterizes the contentions of Whitehouse as to the meaning of the portion of its certificate here involved, the Commission's report does disclose the rationale of its decision:

> "We have carefully considered the testimony of the language expert who supports respondent's interpretation from an academician's point of view. Clearly, however, we are not bound to accept his point of view as controlling our interpretation. Respondent's contentions must be rejected since they are so at odds with the meaning that is harmony with normal usage of this commission's terminology." 99 M.C.C. at 628 (Appendix B).

> and would wipe out the stability and certainty with respect to operating rights of common carriers by motor vehicle required in the public interest and contemplated by the act." *Smith Bros.-Revocation of Certificate*, 33 M.C.C. 465, 472.

In *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424, this Court recognized that it is contrary to the provisions of the Act and its underlying policy for the Commission to impose a restriction upon a certificate in order to implement a subsequently adopted Commission policy:

> "But, as the Commission has said as to motor carrier certificates, while the procedural 'orders' antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding. The certificate, when finally granted and the time fixed for rehearing has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress." 329 U. S. at 432-433. See also *American Trucking Ass'n, Inc.* v. *Frisco Transportation Co.*, 358 U. S. 133, 146. *Cf. CAB* v. *Delta Airlines, Inc.*, 367 U. S. 316.

The Commission's superimposition of an additional limitation upon the Whitehouse certificate which is not contained in the terms thereof represents an attempted amendment thereof not in accordance with Section 212(a) of the Act. This violates the Act and the underlying policy of its certification provisions.

2. As a corollary to the above rule and as a further reflection of the fact that the purpose of the issuance of certificates pursuant to the Act is to provide stability and certainty within the transportation industry, it has been established as a cardinal rule of construction that a plain and unambiguous certificate must be interpreted in accordance with its terms, irrespective of any other policy considerations. This rule was stated in *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co.*, 48 M.C.C. 289 at 301:

> "Interpretations of certificates based on classifications of motor carriers, or on the basis of matters antecedent to the issuance of a certificate, the terms of which are not patently ambiguous, can only lead to instability in the motor carrier industry and uncertainty among their patrons as to the operating rights of motor carriers. Here there is no ambiguity in the terms of defendant's certificate, to the extent in question, and only the terms of the certificate may be looked to in determining its operating rights." See also *Central Wisconsin Motor Transport* v. *Steel Transp. Co.*, 98 M.C.C. 232, 237-38; *Sims M. Transport Lines, Inc.*, 66 M.C.C. 553, 556; *Glendenning Motorway, Inc.*, 49 M.C.C. 440.

This rule was applied in *Andrew G. Nelson, Inc.* v. *United States*, 355 U. S. 554:

> ". . . [W]e first note that the plain meaning of words in a commodity description is controlling in the absence of ambiguity or specialized usage in the trade." 355 U. S. at 557.

The District Court failed to recognize the applicability of this cardinal rule to the certificate here involved.

3. The District Court misconstrued *Andrew G. Nelson, Inc.* v. *United States*, 355 U. S. 554, as holding that the Commission can, on the basis of its administrative expertise, superimpose upon the plain and unambiguous terms of a certificate a restriction which is not contained in the terms of the certificate itself. The District Court failed to distinguish between the interpretation of an ambiguous certificate and the interpretation of an unambiguous certificate. The Commission may appropriately bring to bear its administrative expertise in interpreting an ambiguous certificate which is subject to more than one reasonable construction, but as the above authorities indicate, the Commission is required to interpret an unambiguous certificate in accordance with its plain meaning. The District Court held, in effect, that the Commission is free to impose as

a matter of policy and discretion an additional limitation upon a certificate not contained in the unambiguous terms thereof. Thus, a certificate is reduced to an uncertain temporary grant of authority subject to the everchanging policies of the Commission.

It is submitted that the decision of the District Court strikes at the roots of the policy underlying the certification provisions of the Act and violates the limitations of the Act upon the Commission's authority to modify certificates. This decision directly affects the stability of the motor carrier industry. The question presented by this appeal is, therefore, substantial and of public importance.

Respectfully submitted,

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1a

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 66-45

WHITEHOUSE TRUCKING, INC., A MICHIGAN CORPORATION,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

THE INTERSTATE COMMERCE COMMISSION,

Defendants.

APPENDIX

OPINION

Before: Celebrezze, Circuit Judge; Young, District Judge; and Kloeb, Senior District Judge.

For Cause, Plaintiff, Whitehouse Trucking Company, filed this action to set aside an order of the Interstate Commerce Commission requiring it to cease and desist from transporting certain commodities which it is authorized by the Certificate of Public Convenience and Necessity which plaintiff acquired by purchase in 1964. Several plaintiffs and defendants have been permitted to intervene and present arguments.

In 1964 the Commission, pursuant to 49 U.S.C. 304(c) and 49 U.S.C. 312(a), on its own motion instituted an investigation to determine if plaintiff was operating outside the scope of its authority. The proceeding concerned the

a matter of policy and discretion an additional limitation upon a certificate not contained in the unambiguous terms thereof. Thus, a certificate is reduced to an uncertain temporary grant of authority subject to the ever-changing policies of the Commission.

It is submitted that the decision of the District Court strikes at the roots of the policy underlying the certificate provisions of the Act and violates the limitations of the Act upon the Commission's authority to modify certificates. This decision gravely affects the stability of the motor carrier industry. The question presented by this appeal is, therefore, substantial and of public importance.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

No. C 66-45

WHITEHOUSE TRUCKING, INC., A MICHIGAN CORPORATION,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

and

THE INTERSTATE COMMERCE COMMISSION,

Defendants.

OPINION

Before: Celebrezze, Circuit Judge; Young, District Judge; and Kloeb, Senior District Judge.

Per Curiam. Plaintiff, Whitehouse Trucking Company, filed this action to set aside an order of the Interstate Commerce Commission requiring it to cease and desist from transporting certain commodities found not to be authorized by the Certificate of Public Convenience and Necessity which plaintiff acquired by purchase in 1962. Several plaintiffs and defendants have been permitted to intervene and present arguments.

In 1964 the Commission, pursuant to 49 U.S.C. 304(c) and 49 U.S.C. 312(a), on its own motion instituted an investigation to determine if plaintiff was operating outside the scope of its authority. The proceeding concerned the

proper interpretation of the certificate (Sub. No. 45) which allowed the transportation of the following:

Prefabricated houses and buildings;
Prefabricated house and building sections;
Prefabricated house and building panels, with parts and accessories.

The Commission's hearing examiner decided in favor of the plaintiff's contention that the certificate allows the transportation of prefabricated houses and buildings as well as prefabricated house and building sections and panels, parts and accessories regardless of whether they are intended for use in prefabricated buildings.

The Commission reversed the hearing examiner's recommendation finding that prefabricated sections and panels can be transported only if they are intended for use in a prefabricated house or building; and parts and accessories, only if intended for use in prefabricated houses and buildings or in prefabricated house and building sections and panels. In so doing, the Commission stated that the items to be transported are to be identified in terms of their intended use. Whitehouse was therefore ordered to cease and desist from transporting certain goods not authorized by the certificate as construed. 99 M.C.C. 621 (1965).

Plaintiff's first argument is that the Commission's order is arbitrary and unreasonable, and should therefore be set aside.

The interpretation of the commodities authorized to be transported by a certificate is left largely to the discretion of the Commission, and its construction is controlling unless clearly erroneous, arbitrary, an abuse of discretion or in contravention of some established principle of law. *Andrew G. Nelson, Inc. v. United States*, 355 U.S. 554 (1958); *Malone Freight Lines, Inc. v. United States*, 107 F. Supp. 916 (N.D. Ala. 1952). We have carefully examined the pleadings, briefs and oral argument of all the parties in this

case, as well as the opinion of the Commission and cannot say that the findings of the Commission are clearly erroneous. The Supreme Court has clearly stated that the Commission may adopt the intended use test, *Andrew G. Nelson, Inc. v. United States, supra,* and the validity of the test is no longer open to question. See e.g., *W. T. Mayfield Sons Trucking Co. v. United States,* 234 F. Supp. 655 (N.D. Ga. 1964); *Mitchell Bros. Truck Lines v. United States,* 225 F. Supp. 755 (D.C. Ore. 1963). Furthermore, the manner in which the intended use test was applied by the Commission in this case was not an abuse of discretion.

The fact that the Commission construed the certificate differently from the plaintiff's language experts is not controlling. The Commission need not agree with language experts because it *also* has an expertise in interpreting the language contained in certificates of Public Convenience and Necessity. This expertise is formidable and cannot be lightly regarded by the reviewing courts. *J. B. Acton, Inc. v. United States,* 221 F. Supp. 174 (W.D. Mo. 1963).

Plaintiff also contends that the Commission has made prior administrative determinations that Whitehouse is authorized to transport the disputed items, and that it is bound by such determinations herein.

One branch of this argument relates to the effect to be given to the Commission's approval after a formal hearing of the purchase of the certificate by Whitehouse from Commercial Carriers. In order to obtain approval of the purchase it was necessary to show that the vendor had been conducting lawful operations. It is claimed that some of the items shown to have been transported by the vendor would not be authorized by the present interpretation of the permit. However, the Commission in the present case stated that the operation of plaintiff's predecessor consisted of the shipment of prefabricated houses or buildings and

component parts thereof. We find no basis for refusing to accept this finding as true. This being the case, there is no inconsistency between the purchase case and the present interpretation of the certificate.

It is also contended that the Commission is bound by several other prior administrative rulings. In those cases, grants of authority to other applicants were protested and denied allegedly on the basis that authority to transport certain items not intended for use in prefabricated buildings had already been granted under Sub-No. 45. Even if this were true, the Commission is not bound. In the prior cases, this certificate was not specifically in issue. The I.C.C. is not bound by *stare decisis* and inconsistency in itself is not necessarily unreasonable. *U.S.A.C. Transport, Inc. v. United States*, 235 F. Supp. 689 (D. Del. 1964). Furthermore these cases were determined by examiners. The Commission is not bound by the factual determinations of its examiners and has all the powers which it would have in making the initial decision. Administrative Procedure Act, 5 U.S.C. §1007(a).

There being no error in the decision of the Commission, the plaintiff's prayer will be denied and the temporary restraining order by this Court will be vacated.

/s/ ANTHONY J. CELEBREZZE
Circuit Judge

/s/ DON J. YOUNG
District Judge

/s/ FRANK L. KLOEB
Senior District Judge

Toledo, Ohio.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 66-45

WHITEHOUSE TRUCKING, INC., A MICHIGAN CORPORATION,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
and
THE INTERSTATE COMMERCE COMMISSION,

Defendants.

ORDER

This cause came on to be heard on plaintiff's complaint to set aside an order of the Interstate Commerce Commission requiring it to cease and desist from transporting certain commodities found not to be authorized by the Certificate of Public Convenience and Necessity.

For the reasons stated in the accompanying opinion, it is now

ORDERED that the complaint be and the same is hereby dismissed, and it is

FURTHER ORDERED that the temporary restraining order by this Court be and the same is hereby vacated.

/s/ ANTHONY J. CELEBREZZE
Circuit Judge
/s/ DON J. YOUNG
District Judge
/s/ FRANK L. KLOEB
Senior District Judge

Toledo, Ohio.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. MC-C-4543

WHITEHOUSE TRUCKING, INC.—INVESTIGATION AND REVOCATION OF CERTIFICATES

Decided October 5, 1965

REPORT OF THE COMMISSION

Division 1, Commissioners Murphy, Tucker, and Brown

Tucker, Commissioner:

Separate exceptions to the order recommended by the examiner were filed by the Bureau of Enforcement (formerly the Bureau of Inquiry and Compliance) and an intervener, and respondent replied. Our conclusions differ from those recommended.

By order entered August 26, 1964, the Commission, Vice Chairman Webb, on its own motion instituted an investigation under authority of sections 204(c) and 212(a) of the Interstate Commerce Act, concerning the practices of Whitehouse Trucking, Inc., of Toledo, Ohio, for the purpose of determining whether it is, and has been, engaged in the transportation of certain specified commodities, the transportation of which is not authorized by the terms and conditions of its outstanding certificates, in violation of section 206(a) of the act. The order entered further provided for issuance of an order forthwith suspending, for a stated period, in whole or in part the certificates held

respondent in the event it is found herein that re-
ndent is or has been willfully violating the provisions
section 206(a) of the act and it further directed the
reau of Enforcement to participate as a party in this
ceeding. Hennis Freight Lines, Inc., appeared at the
ring as an intervener in support of the investigation.

The examiner recommended that the specific commodi-
named, infra, could be transported under respondent's
hority to transport "prefabricated houses and buildings,
fabricated house and building sections, prefabricated
se and building panels, with parts and accessories," and
ommended that the investigation should be discontinued.

As a result of these findings, numerous motor carriers [1]
d several joint or separate petitions seeking permission
intervene in the proceeding and also requesting that
ther hearing be held. Respondent replied. We believe
t the effect and scope of the commodity interpretation
olved herein is of such importance to the numerous peti-
ing motor carriers that they should be permitted to
rvene. We believe that the issues will not be unduly
adened, and that good cause has been shown to warrant
intervention. Other parties have filed timely excep-
s, respondent has replied to these exceptions and it has
ied to the noted petitions; accordingly, it in no way
be prejudiced or deprived of a fair hearing by our
siderations of the contentions of the interveners at this
ge in the proceeding. In view of our ultimate conclusions

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[1] Alabama Highway Express, Inc., Alabama Freight, Inc., Arrow
k Lines, Inc., B & L Motor Freight, Inc., Jack Cole Company,
nial Fast Freight Lines, Inc., Darling Freight, Inc., Direct Transit
s Inc., Eagle Motor Lines, Inc., Gordons Transports, Inc., Graff
king Company, Joyce Trucking Company, Melton Truck Lines, Inc.,
igan Transportation Company, Midwest Emery Freight System,
Osborne Truck Line, Inc., Walter Poole, doing business as Poole
k Line, R. W. Express, Ringle Transport, Inc., Sentle Trucking
oration, Severson Transportation, Inc., Southern Trucking Corpora-
St. Louis Freight Lines, Inc., and Wenham Transportation, Inc.

herein, the petitions will be denied to the extent that they seek further hearing.

The principal issues raised on exceptions concern the use and meaning of the word **prefabricated** in the phrases "prefabricated house and building sections, prefabricated house and building panels," and the use and meaning of the word **with** in the phrase "with parts and accessories," as that quoted phraseology is employed in respondent's Sub-No. 45 certificate. It is respondent's contention that its Sub-No. 45 authority permits the transportation of not only prefabricated houses and buildings but also any prefabricated building materials for use in houses and buildings generally. It further contends that the authority also independently authorizes the transportation of any parts or accessories used in houses or buildings. The evidence, the examiner's recommendation and the pleadings have been considered. We find the examiner's statement of facts to be accurate in all material respects, and except as modified herein, we adopt it as our own. Certain facts will be restated to the extent necessary for clarity of discussion.

FACTUAL BACKGROUND

The basic facts are stipulated. Between February 1, 1963, and February 1, 1964, respondent transported 41 shipments of various commodities, including:

air louvers	porcelain enameled panels
aluminum extrusions	siding
aluminum roofing sheets	spiral pipe
aluminum windows	steel beams
concrete roofing slabs	steel lathing
conduit pipe	steel pipe
mineral wool insulation	steel roofing
plywood sheets	steel tubes
	wallboard

between points in 19 midwestern and southern States as set

forth in its Sub-No. 45 certificate, which authorizes the transportation of:

prefabricated houses and buildings, prefabricated house and building sections, prefabricated house and building panels, with parts and accessories.

None of the considered commodities were transported in the same vehicle or on the same bill of lading with prefabricated houses or buildings and it does not appear that they were intended for use in any prefabricated structure. It is noted that the consignors of these shipments may be categorized as producers of building materials rather than manufacturers of prefabricated houses or buildings. Also, the consignees of the considered shipments are most frequently shown to be lumber or building supply dealers rather than contractors or builders.

In addition to the facts stipulated, it appears that respondent holds certain authority under its Sub-No. 44 and Sub-No. 46 certificates to transport:

Buildings, complete, knocked down, or in sections, including all component parts, materials, supplies, and fixtures, and when shipped with such buildings, accessories used in the erection, construction, and completion thereof.

Most all of the considered traffic, however, was transported under respondent's Sub-No. 45 certificate which was issued January 25, 1963, and which it acquired by purchase of a portion of the operating rights of Commercial Carriers, Inc.[2] The record in that proceeding shows that the preponderant number of shipments which had been transported by vendor were of prefabricated buildings, prefabricated houses, or components of such prefabricated structures. Most of the consignors identified in the traffic exhibits were manufacturers of prefabricated buildings

[2] In No. MC-F-8097, Whitehouse Trucking, Inc.—Purchase (Portion)—Commercial Carriers, Inc., in which the hearing examiner's report and recommended order became effective by operation of law November 14, 1962.

as were the three shippers who appeared in support of the application. Although the examiner's report noted that certain commodities such as roofing, siding, beams, and doors had also been transported, there is no suggestion in that report that these commodities had been, or could be, transported as independent shipments of building materials unrelated to their future use as components of prefabricated houses or buildings.

By virtue of the above noted authority respondent solicited and transported traffic consisting of shipments of the commodities named above as well as angles, metal channels, joists, girders, doors, windows, lathing, studding, dimension lumber, porcelain enameled materials, air filters, fiberboard, lathing, and pipe fittings. During 1963 and 1964, it transported more than 83,000 tons of such commodities, involving more than 2.5 million revenue miles. In support of its interpretation of the Sub-No. 45 certificate, respondent introduced the testimony of a professor of English who had also authored several linguistic treatises.

In the 3 years prior to the purchase of the Sub-No. 45 authority, respondent had a combined net loss of over $30,000; however, with increased operations in the first 2 years subsequent to the noted purchase, respondent realized a combined net profit of over $86,000.

DISCUSSION AND CONCLUSIONS

Before a motor common carrier may transport property in interstate commerce under section 206 of the act it must be the holder of a certificate of public convenience and necessity authorizing such operations. Necessarily, the Commission in granting authority must attempt to describe the commodities which are to be transported in such a manner that the authority granted is sufficiently inclusive as to allow the carrier to meet the present and foreseeable future

transportation needs of the general public as evidenced by the shippers who support the application.

I

In this proceeding we are concerned with a certificate which, on its face, certainly appears to be primarily descriptive of the transportation of prefabricated houses and buildings, and certain related commodities. On the other hand, the commodities which have been and are being transported are clearly those which are usually classified as building materials, see appendix VI, *Descriptions in Motor Carrier Certificates* 61 M.C.C. 209. Respondent takes the position that under the wording of its certificate the broad, generic classification "building materials" is embraced within the specific classification of prefabricated buildings, et cetera. We do not agree. The words used to describe the transportation authorized in respondent's certificate are something more than a collection of unrelated words or phrases of general meaning. The terms are used in the context of this Commission's functions and usage of transportation terminology. Obviously, the words *"sections"*, *"panels"*, *"parts"* and *"accessories"*, standing alone, would encompass almost any commodity and would be tantamount to the all inclusive description "general commodities." Respondent does concede, however, that these words are restricted by the modifying language "house and building." Thus, under its interpretation respondent in effect dispenses with the term "prefabricated" and maintains that the words sections, panels, parts, and accessories as used in its Sub-No. 45 certificate import a meaning that is essentially equivalent to authority which the Commission has usually designated as authority to transport "building materials."

The generic description building materials has a definite and broad meaning and it is employed in grants of au-

thority where the underlying evidence of record has warranted its use. The term "prefabricated houses and buildings" embraces a restrictive, single class description which has a definite meaning in transportation parlance, see *Black Extension of Operations—Prefabricated Houses*, 48 M.C.C. 695. Although sections, panels, parts, or accessories of prefabricated houses and buildings, properly may be transported as part of the same undertaking (in the same vehicle or in a separate vehicle if transported in the same manner and at the same time as the prefabricated houses or buildings of which they are ultimately to become an integral part) without specific authorization therefor, specific authority for the transportation of such components is required if they are to be moved as part of a separate undertaking or other than with shipments of prefabricated buildings, see *Bair Extension—Prefabricated Houses*, 52 M.C.C. 477, and *Dealer's Transport Co., Extension—Willow Run*, 48 M.C.C. 199. Thus, the separate listing of sections, panels, parts, and accessories in respondent's certificate is necessary in order to allow it to transport independent shipments of these commodities other than those which might be transported with specific shipments of prefabricated houses and buildings.

Directing our attention solely to the terms "prefabricated * * * section" and "prefabricated * * * panels," we have recently considered this portion of respondent's authority and determined that regardless of whether certain precast concrete slabs and beams were intended to be used as part of a prefabricated house or building, they could not be considered to be prefabricated sections or panels,[3]

[3] In the *White* case, *supra*, we did not consider the further issue of whether the precast concrete slabs and beams involved therein could be transported under the "parts and accessories authority" of respondent's Sub.-No. 45 certificate.

see *White Bros. Trucking Co., Extension—Dayton, Ohio*, 99 M.C.C. 389. As we concluded in that proceeding:

> before a commodity may be considered to be a prefabricated building section or panel for transportation classification purposes, it must be fabricated or assembled as a substantially complete unit that may be installed in a condition that requires little, if any, further construction or finishing.

Here, we believe that those commodities transported by respondent such as roofing sheets or slabs, siding, plywood sheets, wallboard, and porcelain enameled panels are merely standardized building materials that have been manufactured from basic raw materials rather than reasonably complete or functional sections or panels of a building and they cannot be considered to be prefabricated sections or panels for transportation classification purposes. At this point we also wish to observe that the description of several of these commodities as "panels" by a number of manufacturers for "sales" purposes and their use of such a description in a bill of lading, is clearly not controlling, see *Herndon Extension—Veneers*, 89 M.C.C. 278, *Firestone Tire & Rubber Co.* v. *Norwalk Truck Line Co.*, 54 M.C.C. 640, and *Ranger Joe, Inc.* v. *Biter's Transfer Co. Inc.*, 54 M.C.C. 587. Further, the failure of the Commission to reject a tariff listing rates for unauthorized commodities operates neither to convey new authority nor to condone the unlawful conduct, see *Simpson—Investigation and Revocation*, 73 M.C.C. 75.

Under some circumstances, the need for service shown by the evidence of the supporting shippers and public witnesses calls for a grant of authority whereby a carrier may be authorized to perform a complete service in a select field and, at the same time, be restricted to that particular field.

Thus, the commodities to be transported are identified in terms of their use or intended use. That the Commission properly may employ this so-called intended use test is no longer open to question, see *Mitchell Bros. Truck Lines* v. *United States*, 225 F. Supp. 755 (1963).

In the instant proceeding, when respondent's certificate is read in the light of Commission usage, we believe that it clearly conveys the intent to restrict the authority set forth to the field of prefabricated houses and buildings, while, at the same time allowing the holder of that certificate to provide a complete service to the shippers of prefabricated houses and buildings in order that they might also ship accessories related to the primary commodity. Surely, if any other meaning were conveyed or if the considered phrases were read separately, the terms sections, panels, parts, and accessories would necessarily be the equivalent of the Commission's generic descriptions "building materials" or "general commodities." This would be clearly inconsistent with the Commission's normal usage of specific and generic commodity descriptions.

Respondent attempts to justify the questioned operations by relying upon the decision of the United States District Court, So. Dist. of Ill., So. Div., in civil action No. 2394, decided July 31, 1958, wherein the court issued an injunction restraining the enforcement of the order of the Commission in *Whitehouse Trucking, Inc.*, v. *Pre-Fab Transit Co.*, 71 M.C.C. 155. In that proceeding the Commission held that Pre-Fab was authorized to transport parts, materials, supplies, or fixtures only when moving in connection with the building or buildings of which they are a part. On appeal, the court merely held that under that carrier's certificate "it has authority to transport component parts, materials, supplies or fixtures either independently or in connection with the transportation of build-

ings." In this proceeding it is not questioned that a shipment of "parts" or "accessories" may be transported as part of a separate undertaking apart from a shipment of a prefabricated building. That matter is not and never was at issue in reading the respondent's Sub-No. 45 certificate; see the *Bair* case, *supra*.

We have carefully considered the testimony of the language expert who supports respondent's interpretation from an academician's point of view. Clearly, however, we are not bound to accept his point of view as controlling our interpretation. Respondent's contentions must be rejected since they are so at odds with the meaning that is in harmony with normal usage of this Commission's terminology. See *Pierce Auto Freight Lines, Inc.*, v. *Converse*, 54 M.C.C. 447, affirmed, *Converse* v. *United States*, 109 F. Supp. 807 (1953), and *J. B. Acton, Inc.—Investigation and Revocation of Cert.*, 89 M.C.C. 59, affirmed, *J. B. Acton, Inc.*, v. *United States*, 221 F. Supp. 174 (1963).

Further, there is no showing by the respondent that the operating rights it purchased were interpreted at the time of the issuance of the certificate to itself or to the original holder to allow handling of commodities other than prefabricated houses and buildings. To the contrary, should it be considered necessary for us to look behind the wording of the certificate, the records in the respective application and purchase proceedings clearly show that the considered authority was first granted for the purpose of providing a complete transportation service for the manufacture of prefabricated houses and buildings in order that they might ship the structure itself, substantially complete floor, wall, or roof units (i.e., sections and panels), and parts and accessories necessary to complete the specific structure.[4] As

[4] No. MC-43038 (Sub-No. 318), Commercial Carriers, Inc., Extension—Prefabricated Houses, in which the grant of authority became effective January 15, 1947.

noted previously, the operations conducted by respondent's predecessor predominantly consisted of transportation of prefabricated houses or buildings and some shipments of components of such prefabricated buildings. Clearly, there was no intent that the authority purchased should embrace unrestricted authority to transport all "building material" regardless of their intended use and it fairly appears that the purchase price paid was significantly related only to authority to transport prefabricated houses and buildings and the components necessary for their completion. Compare *Consolidated Copperstate Lines, Inc.*, v. *Navajo Freight*, 92 M.C.C. 516, 519.

II

In summation, we observe that for purposes of transportation classification, the Commission has long maintained a specific classification relative to prefabricated buildings and their component accessories and parts which classification is clearly distinct from the generic description "building materials." We are convinced that respondent's certificate must be read in the light of Commission usage and in this content its certificate authorizing the transportation of:

> prefabricated houses and buildings, prefabricated house and building sections, prefabricated house and building panels, with parts and accessories,

must be construed only to authorize the transportation (1) of prefabricated houses and buildings, (2) of prefabricated sections, and prefabricated panels which are intended for use in a prefabricated house or building, and (3) of parts and accessories intended for use in prefabricated houses and buildings and prefabricated house and building sections and panels. As discussed above it most assuredly does not embrace authority to transport any "building material"

that might be used for any purpose or in any house or building.

Respondent had transported and continues to transport building materials, as specified above, which are not intended for use in prefabricated houses or buildings. In our opinion, such transportation is not authorized under its Sub-No. 45 certificate and it constitutes a clear and continued violation of the act which demonstrates either intentional disregard or plain indifference to the certificate requirements of the act. We will accordingly issue an order requiring respondent to cease such operations which are beyond the scope of its authority as described herein. Although we do not feel that there is adequate justification for a suspension of respondent's certificates we believe that the proceeding should be held open to allow the Bureau to petition for suspension or revocation if future compliance with our order to cease and desist from the noted violations is not forthcoming.

FINDINGS

We find that the certificate heretofore issued to respondent in No. MC-106760 (Sub-No. 45), for the transportation of "prefabricated houses and buildings, prefabricated house and building sections, prefabricated house and building panels, with parts and accessories," authorizes the transportation (1) of prefabricated houses and buildings, (2) of prefabricated sections which are intended for use in a prefabricated house or building (3) of prefabricated panels which are intended for use in a prefabricated house or building, and (4) of parts and accessories which are intended for use in prefabricated house and buildings or in prefabricated house and building sections and panels; and that this operating authority includes such items as are commonly identified as "building materials" only to the

extent that they are parts and accessories intended for use in prefabricated houses or buildings or in prefabricated house and building sections or panels.

We further find that respondent is and has been engaged in the transportation of "building materials" other than those specified in the preceding paragraph; that such operation is not within the scope of the certificate issued to respondent in No. MC-106760 (Sub-No. 45); that such operation is and has been in violation of section 206 (a) of the Interstate Commerce Act; that an order should be entered requiring respondent to cease and desist from all operations in interstate or foreign commerce of the character found in this report to be unlawful unless appropriate authority therefor has been obtained, and that the proceeding should be held open for such further proceedings as may be warranted.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 5th day of October A. D. 1965.

No. MC-C-4543

WHITEHOUSE TRUCKING, INC.—INVESTIGATION AND REVOCATION OF CERTIFICATES

It appearing, That by respective petitions B & L Motor Freight, Inc., Darling Freight, Inc., Direct Transit Lines, Inc., Graff Trucking Company, Joyce Trucking Company, Michigan Transportation Company, Midwest Emery Freight System, Inc., R. W. Express, Ringle Transport, Inc., Sentle Trucking Corporation, Severson Transporta-

tion, Inc., St. Louis Freight Lines, Inc., and Wenham Transportation, Inc., filed June 7, 1965, Alabama Highway Express, Inc., Alabama Freight, Inc., Arrow Truck Lines, Inc., Jack Cole Company, Colonial Fast Freight Lines, Inc., Eagle Motor Lines, Inc., Osborne Truck Line, Inc., Walter Poole, dba, Poole Truck Line, and Southern Trucking Corporation, filed June 14, 1965, Gordons Transports, Inc., filed June 14, 1965; and Melton Truck Lines, Inc., filed June 17, 1965, seek permission to intervene and that the proceeding be set for further hearing; and good cause appearing therefor:

It is ordered, That the carriers named in the preceding paragraph, be and they are hereby, permitted to intervene in this proceeding with the right to appear and participate in all further proceedings therein;

And it further appearing, That the proceeding having been duly instituted, and full investigation of the matters and things involved having been made, and said division on the date hereof having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is further ordered, That respondent be, and it is hereby, ordered and required to cease and desist forthwith and thereafter refrain and abstain from all operations in interstate or foreign commerce, of the character found in said report to be unauthorized and in violation of the said act unless authorization for such operations is obtained; and that the petitions for further hearing be, and they are hereby, denied, for the reason set forth in the report.

It is further ordered, That the proceeding be, and it is hereby held open for the purpose of permitting the Bureau of Enforcement, Interstate Commerce Commission, to petition for the immediate suspension or for the revocation, in whole or in part, of respondent's certificate of public con-

venience and necessity issued by the Commission, in No. MC-106760 and Sub Nos. thereunder if the compliance required by this order is not achieved and maintained; and this proceeding is further held open for the purpose of allowing respondent at any time on and after the expiration of one year from the effective date of this order to petition for vacation of this order, provided said petition affirmatively avers and offers to prove that said respondent has achieved and maintained the compliance required by this order.

And it is further ordered, That the statutory effective and compliance date of this order be, and it is hereby, fixed as November 26, 1965.

By the Commission, division 1.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. MC-C-4543

WHITEHOUSE TRUCKING, INC.—INVESTIGATION AND REVOCATION OF CERTIFICATES

REPORT AND ORDER

Recommended by John B. Mealy, Examiner

By order entered August 26, 1964, the Commission, Vice Chairman Webb, on its own motion instituted an investigation under authority of sections 204(c) and 212(a) of the Interstate Commerce Act to determine whether Whitehouse Trucking, Inc., of Toledo, Ohio, thereby made a respondent in this proceeding, is and has been transporting certain commodities not authorized by its certificates authorizing transportation, in interstate or foreign commerce, of certain specified commodities, including "prefabricated houses and buildings, prefabricated house and building sections, prefabricated house and building panels, with parts and accessories," in violation of section 206(a) of the Act, with a view to the entry, if such violations be found, of an appropriate order requiring respondent to cease and desist and refrain from said violations and upon the wilful failure of said respondent to comply with such order, providing for consideration as to whether such certificates of respondent should be suspended or revoked. The order entered August 26, 1964, further provided for issuance of an order forthwith suspending, for a stated period, in whole or in part the certificates held by respondent in the event it is found herein that respondent is or has been wilfully violat-

ing the provisions of section 206(a) of the Act; it further directed the Bureau of Inquiry and Compliance, hereinafter called the Bureau, to participate as a party in this proceeding.

The matter was referred to the examiner for hearing and the recommendation of an appropriate order thereon, accompanied by the reasons therefor. A hearing was held on March 8 and 9, 1965, at Toledo, Ohio. The Bureau appeared as a party in the proceeding and Hennis Freight Lines, Inc., appeared as an intervenor, both in support of the investigation. Hennis adduced no evidence.

At the hearing, it was stipulated by and between the Bureau and respondent that the latter, between February 1, 1963, and February 1, 1964, transported various commodities, including air louvers, concrete slabs, aluminum roofing, fibreboard, mineral wool, plastic sheeting, plywood paneling, porcelain-enameled panels, pipe and pipe fittings, structural footwalks, window sash, and steel products (including beams, lath panels, roofing, siding, and tubing), between points authorized in its Sub 45 authority, which authorizes the transportation of "prefabricated houses and buildings, prefabricated house and building sections, prefabricated house and building panels, with parts and accessories." In addition to the stipulation, the sole evidence adduced by the Bureau consists of a letter of October 11, 1963, from the Director, Bureau of Motor Carriers, to respondent's counsel in expression of the informal opinion to the effect that the above-quoted authority does not embrace building materials to be used in houses or buildings which are not prefabricated.

Respondent for many years engaged in the transportation of prefabricated buildings, and component parts thereof when shipped therewith. Its principal competitor for such traffic was Pre-Fab Transit Co., which under authority

to transport "*Buildings* complete, knocked down, or in sections, including all component parts, materials, supplies, and fixtures, and when shipped with such buildings, *accessories* used in the erection, construction, and completion thereof, over irregular routes," also undertook the transportation of parts, materials, supplies and fixtures independently of the transportation of buildings. Respondent, which then held authority (Sub-No. 44) containing precisely the same commodity description filed a complaint with the Commission in July 1955, alleging that, under its above-quoted authority, Pre-Fab is authorized to transport component parts of buildings only when such parts are shipped together with such buildings. This matter ultimately was adjudicated by the United States District Court, So. Dist. of Ill., So. Div. in Civil Action No. 2394, wherein the Court, disagreeing with the views of respondent and the Commission, on July 31, 1958, ruled that Pre-Fab, under the explicit terms of its certificate, holds authority to transport parts, materials, supplies and fixtures of buildings either independently or in connection with the transportations of buildings. On August 6, 1963, respondent was granted further authority containing exactly the same description (Sub-No. 46). In the meantime, respondent purchased a portion of the operating rights of Commercial Carriers, Inc. (respondent's Sub-No. 45 authority) which purchase was approved and authorized [1] in No. MC-F-8097 by order served October 15, 1962. Under such authority respondent regularly and openly has solicited and transported traffic consisting of shipments of angles, metal channels, roofing, steel beams, joists, girders, doors, windows,

[1] The hearing examiner's report shows that evidence adduced therein establishes that the operations conducted by Commercial Carriers, Inc., under said authority had included shipments consisting of pieces of building material, angles, bolts, nuts, metal panels, metal channels, steel beams, hardware, roofing, siding, doors, and windows.

lathing, studding, mineral wool insulation bats, dimension lumber, porcelain enameled material, plywood panels, air filters, fiberboard, lathing, and pipe and pipe fittings. During 1963 and 1964 under its Subs 44, 45, and 46 authority (mostly Sub-No. 45), it transported more than 83,000 tons of such commodities, involving more than 2.5 million revenue miles. The handling of this traffic has resulted in sizable increases in its vehicular equipment and personnel. From its operations conducted during 1960-1962, it had a net loss exceeding $30,000. For 1963-1964, it showed a net profit exceeding $86,000. All the commodities transported were for use in a building and many of the shipments were delivered to such jobsites. For the purposes of this proceeding, respondent admits that none of the considered commodities was transported in the same vehicle or on the same bill of lading with prefabricated houses or buildings. It is respondent's contention that its Sub-No. 45 authority permits of the transportation of not only prefabricated houses and buildings but also any prefabricated building materials for use in houses and buildings generally. It further contends that the authority also independently authorizes any parts or accessories used in houses or buildings. If said authority were interpreted to mean the same as its Sub-No. 5 authority, for example, (Prefabricated buildings, including component parts of such building when shipped therewith), it would suffer the loss of a great volume of the traffic it presently handles.

Several shippers testified on behalf of respondent. *Inland Steel Products* makes sheet metal products in accordance with customer specifications for use in the construction industry. *United Sheet Metal* makes spiral pipe and fittings, used principally as air-conditioning ducts in buildings.

Republic Steel Manufacturing Corporation fabricates steel windows, beams, lath, roofing materials, and joists, most of which is delivered directly to construction jobsites. *Owens-Corning Fiberglass Corporation* makes mineral wool insulation sheets or bats cut to predetermined lengths. *Masonite Corporation* manufactures precut hardwood panels and siding. *Triangle Conduit and Cable Company* produces electrical conduit pipe and cable for use in homes and buildings. *Flintkote Company,* and its *Insulrock Division,* produce fibre paneling (roofdeck and siding) for specific structures. *Wheeling Steel Corporation* engineers roofing jobs, producing therefor roof decks, metal lath, metal gratings, and galvanized sheets. *Armstrong Cork Company* makes roofing, siding, and ceiling materials. *Fenestra Inc.,* and *Davidson Enamel Products,* a subsidiary, make flooring and roofing and wall panels and sections.

Most, if not all, of the above-named shippers have utilized the services of Commercial Carriers, Inc., prior to sale of its operating rights to respondent. All of them are presently using respondent's service from and to points authorized in its Sub-No. 45 authority. Each of them is fully aware of the phrasing of the commodity description set forth in respondent's Sub-No. 45 authority. For somewhat varying views, each of them consider such authority includes the above-mentioned products. They rely upon the services rendered by respondent and desire its continued availability.

A building designer-consultant of extensive background experience, singly and as a member of organizations, has actively sponsored the use of dimensional standards in the production of building materials. He is aware of the vast amount of sub-assembly pre-engineering of building-

material components and segments of floor, wall, and roofing products. The industry uses the terms "sections" and "panels" to describe a diversity of building components.

A university professor of English, who also has authored several linguistic treatises, testified herein as an expert witness regarding the linguistic implications of the phrasing of respondent's Sub-No. 45 authority. As confirmed in the latest dictionaries, the meaning to be ascribed to "prefabricated" refers to a unit or standardized parts thereof factory-made for assembly or uniting. The words "panel" and "section" are terms having little exactitude in meaning, covering many classifications or categories for which there is no recognized word in the English language. The terms "house and building sections" and "house and building panels" must be recognized to consist of the common modern English usage where nouns are used to modify a noun. Where a series of commas are used to separate words or phrases it must be borne in mind that a comma usually is employed in a non-restrictive sense. The phrase (in a series) succeeding a comma cannot be used in a rigidly restrictive sense. In such usage, the use of a comma makes it, not only possible, but necessary to regard the succeeding phrase as non-restrictive in character. If it were intended that the last phrase of the considered commodity description (namely, "with parts and accessories") was to be governed by each of the preceding units of the description, the writer thereof should have used a comma and a dash or a colon to so indicate. It is clear also if use of the word "with" (in "with parts and accessories") was intended in any way to restrict the authority of the carrier, its employment, standing alone, cannot be construed as having that effect. If a restriction was intended, a much sharper designation of terms and use of more qualifying phrases would be needed to express such an intention.

"With" as used here, on the basis of ample linguistic authority must be construed to be part of a non-limiting prepositional phrase. Since the word "part" is of itself almost without limitation as related to the whole item in question, the considered commodity description is of broad scope.

DISCUSSION AND CONCLUSIONS

A cardinal rule followed by this Commission in certificate interpretation is that the certificate must be construed according to its terms regardless of what may have been intended, if not patently indefinite or ambiguous. And this rule is followed regardless of whether the practical result is to confer upon the carrier more or less authority than may have been intended to be granted originally. Otherwise an intolerable uncertainty would arise as to the finality of any operating rights granted. See *Central Wisconsin Motor Transport v. Steel Transp. Co.*, 98 M.C.C. 232. In keeping therewith, the examiner feels constrained to avoid consideration of what was intended at the time of issuance of the considered authority. The examiner concludes that the certificate speaks for itself and that its terms do not amount to a patent ambiguity.

In interpreting respondent's Sub-No. 45 authority, or in construing any language, it must be assumed that each of the words and phrases, and each use of a word or phrase, is intended to have a determinate meaning. Hence the repetitive use of the word "prefabricated" must be considered to modify not only "houses and buildings" but separately, and, in addition, "sections" and "panels". Repetition of the phrase "house and buildings", of necessity, must similarly demonstrate that these terms modify "sections" and "panels". For the language to be interpreted, in its totality, to have reference only to prefabri-

cated houses, and sections, panels, parts and accessories thereof, the repeated words and phrases of the description would have to be considered to be redundant. As aforesaid, the assumption that redundancy has been employed must be avoided. Here then, reference has been made in this description to prefabricated panels and sections of houses and buildings generally, not merely those for use in prefabricated structures. Having so determined, the succeeding phrase (namely, "with parts and accessories") must be deemed to refer back to each of the three antecedent commodity descriptions, meaning, therefore, parts and accessories of prefabricated houses and buildings, as well as parts and accessories of prefabricated sections or prefabricated panels of houses and buildings generally.

There is some reference made in the presentation of evidence herein that the "with" in the phrase "with parts and accessories" should be construed as meaning such as "when shipped therewith". Although the examiner is of the opinion that use of the word "with" is somewhat improper, it cannot be construed as creating any ambiguity. Linguistically it cannot be taken to have the fuller and restrictive meaning of "when shipped therewith", however. Neither could it be accorded the meaning such as "accompanying" or "moving with" since, as such, the ridiculous effect of such a meaning would be that no houses, no buildings, no panels, or no sections, could be transported unless some quantity of parts or accessories moved with them. The examiner makes no attempt to determine whether the words "sections," "panels," "parts," or "accessories" have any exactitude of meaning. It is his conclusion, however, that, taken in concert they permit of the transportation by respondent, under its Sub-No. 45 authority, of all commodities which it is claimed herein that it has been and is transporting without appropriate authority.

FINDINGS

Upon consideration of all evidence of record, the examiner finds that transportation by respondent, Whitehouse Trucking, Inc., of air louvers, aluminum extrusions, aluminum roofing and accessories, concrete slabs, expanded steel lath or ribs, fiberboard mineral wool insulation sheets or bats, plastic sheets, plywood, plywood paneling, porcelain enameled panels, special pipe and pipe fittings, steel beams, steel panels, steel plaster grounds, roofing, siding, steel tape, steel welded tube, structural footwalks, window sash, wrought steel pipe, sheet metal products for use in buildings, electrical conduit pipe and cable, metal angles, joints, girders, and doors, from and to points authorized therein was and is within the scope of its Sub-No. 45 authority to transport prefabricated houses and buildings, prefabricated house and building sections, prefabricated house and building panels, with parts and accessories; and that the investigation should be discontinued.

It is recommended that the appended order be entered.

By John B. Mealy, Examiner.

(Signature) JOHN B. MEALY

APPENDIX D

National Transportation Policy, preceding Interstate Commerce Act, 49 U.S.C., 54 Stat. 899.

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 204(c) of the Interstate Commerce Act, 49 U.S.C. §304(c), 49 Stat. 546.

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such in-

vestigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

Section 206(a) (1) of the Interstate Commerce Act, 49 U.S.C. 306(a) (1), 49 Stat. 551.

(a) (1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or is engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instances as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in subsection (b) of this section and within one hundred and twenty days after October 1, 1935, and if

such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operations to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307(a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful.

Section 212(a) of the Interstate Commerce Act, 49 U.S.C. 312(a), 49 Stat. 558.

(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304(c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been

violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 306, 309, or 311 of this title, or by virtue of the second proviso of section 306(a) of this title or temporary authority under section 310a of this title, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 311(c), 317(a), or 318(a) of this title or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

Section 8(b) of the Administrative Procedure Act, 5 U.S.C. §1007(b), 60 Stat. 242.

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SUPREME COURT, U. S.

MAY 11 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1255

WHITEHOUSE TRUCKING, INC., *Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HENNIS FREIGHT LINES, INC., ET AL., *Appellees*

On Appeal from the United States District Court for the Northern District of Ohio

MOTION TO AFFIRM OF APPELLEE HENNIS FREIGHT LINES, INC.

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Whitehouse Trucking, Inc.—Investigation and Revocation of Certificates, 99 M.C.C. 621, Whitehouse Trucking, Inc. v. U. S., et al., 261 F. Supp. 9	2
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1255

WHITEHOUSE TRUCKING, INC., *Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HENNIS FREIGHT LINES, INC., ET AL., *Appellees*

On Appeal from the United States District Court for the Northern District of Ohio

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MOTION TO AFFIRM OF APPELLEE HENNIS FREIGHT LINES, INC.

Pursuant to the provisions of Rule 16 1(c) of the Revised Rules of this Court, appellee Hennis Freight Lines, Inc., moves that the judgment of the district court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from a final judgment of a statutory three-judge District Court for the Northern District of Ohio in which the court below, *per curiam*, dismissed appellant's action in which it sought to set aside and have vacated an order of the Interstate Commerce Commission in which a motor common carrier certificate of public convenience and necessity of appellant was construed and in which the Commission ordered appellant to cease and desist from transporting commodities in interstate commerce beyond the scope of its said certificate (J.S. App. A; J.S. App. B). The litigation was brought about by an order of the Commission on its own motion instituting an investigation under authority of Sections 204(c) and 212(a) of the Interstate Commerce Act (49 U.S.C. § 304(c) and 312(a)). A hearing was held before an examiner of the Commission on March 8 and 9, 1965, at which Hennis Freight Lines, Inc., appeared and participated as an intervenor in support of the investigation and Hennis has participated in all other proceedings below. It files this motion to affirm as a party appellee.

The Commission's decision is reported at 99 M.C.C. 621 (*Whitehouse Trucking, Inc.—Investigation and Revocation of Certificates*); and the opinion of the court below is reported at 261 F. Supp. 9 (J.S. App. B, A).

Appellant's predecessor in interest in order to provide service for the prefabricated house building industry, obtained from the Commission a motor common carrier certificate which now is appellant's Sub-No. 45 certificate. It authorizes the transportation of:

> "Prefabricated houses and buildings, prefabricated house and building sections, prefabricated

house and building panels, with parts and accessories."

When appellant obtained the said certificate,* the evidence in the purchase proceeding disclosed that its vendor had transported under the said certificate preponderantly shipments of prefabricated buildings, prefabricated houses, or components of such prefabricated structures. Most of the consignors identified in the traffic exhibits in the purchase proceeding were manufacturers of prefabricated buildings as were the three shippers who appeared in support of the application (J.S. App. A, pp. 9a, 10a).

However, after appellant obtained the said certificate and between February 1, 1963, and February 1, 1964, it transported shipments of various commodities including:

air louvers	porcelain enameled panels
aluminum extrusions	sidings
aluminum roofing sheets	spiral pipe
aluminum windows	steel beams
concrete roofing slabs	steel lathing
conduit pipe	steel pipe
mineral wall insulation	steel roofing
plywood sheets	steel tubes
	wallboard

between points in 19 Midwestern and Southern states. The Commission found that none of these commodities were transported in the same vehicle or on the same bill of lading with prefabricated houses or buildings and it did not appear that any were intended for use in any prefabricated structure. It further noted that

* In MC-F-8097, Whitehouse Trucking, Inc.—Purchase (Portion) Commercial Carriers, Inc., November 14, 1962.

the consignors of the shipments were producers of building materials rather than manufacturers of prefabricated houses or buildings and that the consignees of the considered shipments were most frequently shown to be lumber or building supply dealers rather than contractors or builders (J.S. App. A, pp. 8a, 9a).

In construing the certificate, the Commission held that it authorized the transportation of (1) prefabricated houses and buildings, (2) prefabricated sections which were intended for use in a prefabricated house or building, (3) prefabricated panels which are intended for use in a prefabricated house or building, and (4) parts and accessories which are intended for use in prefabricated house and buildings or in prefabricated house and building sections and panels; and that the operating authority included such items as are commonly identified as "building materials" only to the extent that they are parts and accessories intended for use in prefabricated houses or buildings or in prefabricated house and building sections or panels (J.S. App. A, pp. 17a, 18a). Appellant, on the other hand, took the position in the Commission proceeding and in the court below that the certificate in question authorized it to transport "building materials" generally, thus ignoring totally the presence of the word "prefabricated" throughout the language of the certificate.

The three-judge District Court, *per curiam*, sustained the Commission's interpretation of the certificate in its entirety (J.S. App. A).

ARGUMENT

The mere statement of the case makes it apparent that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument. Contrary to the contention of appellant, the question involved is not of importance to the motor carrier industry nor to the administration of the Interstate Commerce Act. There are extremely few certificates in existence of the type involved here and the motor carrier industry generally is not looking toward this Court for a full interpretation of the certificate language beyond that clearly pronounced by the Commission and sustained by the court below. The facts demonstrate clearly that the Commission granted the certificate in the first instance in order to permit appellant's predecessor in interest to provide a service to the prefabricated building industry so that shippers utilizing the carrier's service might ship the structure itself, substantially complete floor, wall or roof units (i.e., sections and panels), and parts and accessories necessary to complete the specific structure (J.S. App. A, p. 15a). Appellant, however, through a tortured interpretation of the certificate language, elected to construe its certificate to authorize the transportation of "building materials" generally ignoring the descriptive and restrictive word "prefabricated" which appears throughout the certificate. The Commission's interpretation of the certificate under the circumstances was obviously reasonable and clearly not an abuse of its discretion.

(1) The Commission's interpretation has not resulted in the imposition of an additional limitation or amendment to the certificate. Appellant's reliance on

the suspension, termination and amendment provisions of Section 212(a) of the Act (49 U.S.C. § 312(a)) and *U. S.* v. *Seatrain Lines, Inc.*, 329 U.S. 424, is totally misplaced. Appellant contends that the Commission has superimposed a limitation upon its certificate not contained in the terms thereof and thus has effected an amendment not in accordance with the cited provision of the act. The "additional limitation" alluded to but not made clear is apparently the Commission's interpretation of the certificate to mean prefabricated buildings and houses and items in relation thereto. Appellant apparently contends that the Commission by interpreting its certificate in a fashion different from its own tortured interpretation has somehow "amended" the certificate and deprived it of something which it formerly had. There is no merit in this argument. The short answer to this contention is found in *Simpson* v. *U. S.* (D. C. Iowa, 1961), 200 F. Supp. 372-378, affirmed 369 U.S. 526, in which the district court, in a review of a Commission interpretation of a motor carrier's certificate, stated:

> "[6] The plaintiff urges that the action of the Commission, in interpreting his certificates, amounts to a restriction, modification or partial revocation of those certificates in violation of Section 212(a) of the Interstate Commerce Act, 49 U.S.C.A. § 312(a). It is true that the limitations placed upon the Commission's power to modify such certificates may not be by-passed under the guise of interpretation. Andrew G. Nelson, Inc. v. United States (1958), 355 U.S. 554, 558-559, 78 S.Ct. 496, 2 L.Ed.2d 484. However, as stated by the Court in Sims Motor Transport Lines v. United States (D.C. 1959), 183 F. Supp. 113, 117, aff'd (1960), 362 U.S. 637, 80 S.Ct. 1076, 4 L.Ed.2d 1019, in response to a similar argument:

> 'The short answer to plaintiff's first contention is that *the orders* plaintiff asks us to set aside *take no rights from it, but merely interpret what rights it had from the beginning. It is apparent from the record that defendant Commission has not sought to diminish or modify, under guise of interpretative action, or otherwise, the operating authority of plaintiff but has rather endeavored to provide a reasonable and fair construction of the same.'*

"In Andrew G. Nelson, Inc. v. United States, supra, the Supreme Court stated the rule as follows (pages 558-559 (footnote 4) of 355 U.S., page 499 of 78 S.Ct.):

> 'Commission interpretation of * * * a permit, *being simply a definitive declaration of what rights existed from the very beginning under the permit, cannot be equated with modification * * * unless found to be clearly erroneous.'

"Since it has been determined that the report and order of the Commission in the present case is not clearly erroneous, such interpretation *is but declaratory of the operating authority possessed by plaintiff from the time of acquisition of his certificates and in no way diminishes that authority from what it once was.*" (Emphasis supplied.)

(2) Appellant contends under Points 2 and 3 of its jurisdictional statement that the Commission has departed in some fashion from the rule of construction that a plain and unambiguous certificate must be interpreted in accordance with its terms and that the district court misconstrued *Andrew G. Nelson, Inc.* v. *U. S., supra,* as holding that the Commission can, on the basis of its administrative expertise, superimpose upon the plain and unambiguous terms of a certificate a restriction which is not contained in the terms of

the certificate. These contentions are erroneous. In the first instance, the Commission's decision, and the district court's sustaining it, were based on an interpretation of the language of the certificate itself. The Commission expressly pointed out (J.S. App. A, p. 11a) that in this proceeding "we are concerned with a certificate which, on its face, certainly appears to be primarily descriptive of the transportation of prefabricated houses and buildings and certain related commodities." The Commission, after reviewing the evidence and applicable decisions, concluded that:

> "In the instant proceeding, when respondent's certificate is read in the light of Commission usage, we believe that it clearly conveys the intent to restrict the authority set forth to the field of prefabricated houses and buildings. . . ." (J.S. App. A, p. 14a)

And finally it further expressly stated:

> "To the contrary, *should it be considered necessary for us to look behind the wording of the certificate,* the records in the respective application and purchase proceedings clearly show that the considered authority was first granted for the purpose of providing a complete transportation service for the manufacture of prefabricated houses and buildings in order that they might ship the structure itself. . . ." (J.S. App. A, p. 15a) (Emphasis supplied.)

Thus, the Commission reached its ultimate conclusion based on the terms of the language of the certificate alone and merely confirmed that conclusion on other circumstances.

The District Court did not misconstrue *Andrew G. Nelson, Inc.* v. *U. S., supra,* as holding that the Com-

mission can, on the basis of its administrative expertise, superimpose upon the plain and unambiguous terms of a certificate a restriction which is not contained in the terms of the certificate itself. The district court cited *Andrew G. Nelson* for two principles: (1) the interpretation of the commodities authorized to be transported by a certificate is left largely to the discretion of the Commission, and its construction is controlling unless clearly erroneous, arbitrary, an abuse of discretion or in contravention of some established principle of law; and (2) this Court has clearly stated that the Commission may adopt the intended use test (J.S. App. A., pp. 2a, 3a). These principles are both sound and applicable and *Andrew G. Nelson, Inc.* v. *U. S.* was most assuredly not misconstrued by the court below. See *Kroblin Refrigerated Xpress, Inc.* v. *U. S.* (D.C. 1961), 197 F. Supp. 39, 41-42; *Ace Lines, Inc.* v. *U. S.* (D. C. 1960), 197 F. Supp. 591, 595; *Malone Freight Lines* v. *U. S.* (D. C. 1952), 107 F. Supp. 946, 949, affirmed (1953), 344 U.S. 925.

It has long been the practice of the Commission to view as a whole commodity descriptions in motor carrier certificates. *Whitfield Tank Lines, Inc., et al.* v. *Springer Transfer Company, et al.*, 96 M.C.C. 285. This rule of construction has been upheld by the courts on many occasions. For example in *Union Cartage Co.* v *U. S.* (D. C. Mass. 1961), 193 F. Supp. 645, 646, it was stated:

> "The meaning of a phrase, like a word, is shaped and colored by its surroundings. Familiar principals of *ejusdem generis, in pari materia,* or *noscitur a sociis,* are all ways of saying that the whole must be looked at, and not a single part separately."

Yet, appellant seeks to ignore the presence and the meaning of the descriptive and limiting word in its own certificate "prefabricated" rather than view the language of the certificate in its whole context. The Commission's interpretation of the certificate was obviously reasonable and by no means an abuse of its discretion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the questions presented by appellant are clearly insubstantial and that the judgment of the district court should be affirmed.

Respectfully submitted,

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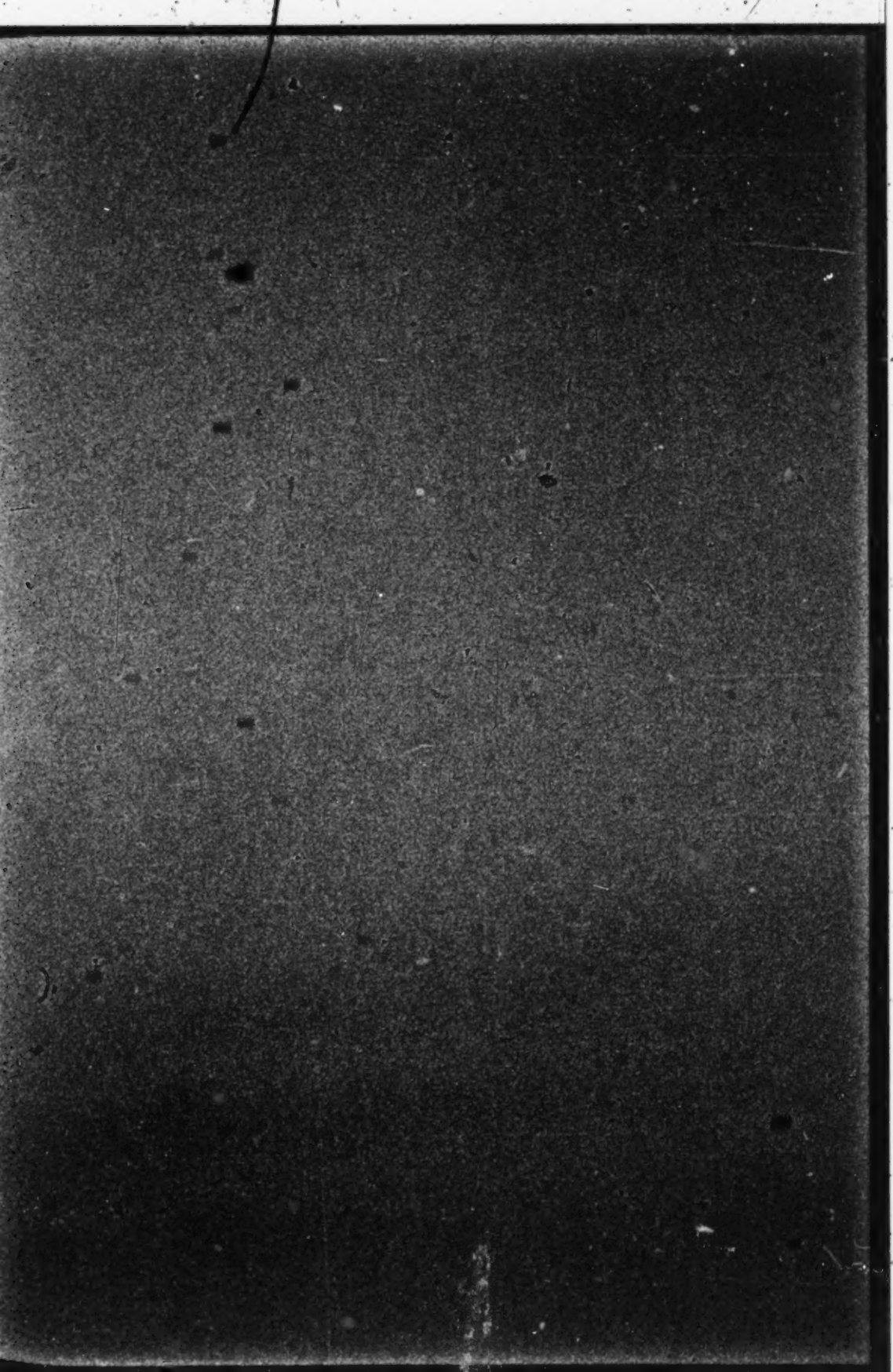

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

WHITEHOUSE TRUCKING, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Intervening Defendants Darling Freight, Inc., R. W. Express, Inc., Ringle Express, Inc., Michigan Transportation Co., Severson Transport, Inc., Wenham Transportation, Inc., St. Louis Freight Lines, Inc., B & L Motor Freight, Inc., Graff Trucking Co. Inc., Midwest Emery Freight System, Inc., Sentle Trucking Co., Joyce Trucking Co., Direct Transit Lines, Inc., Melton Truck Lines, Inc., Hennis Freight Lines, Inc. move that the judgment of the district court be affirmed.

STATEMENT

The Appellees herein adopt the United States of America and the Interstate Commerce Commission's statement of facts as presented to this Court in their Motion to Affirm.

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The district court correctly held that the Commission's interpretation of the commodity description in the instant certificate was not clearly erroneous or an abuse of discretion. The district court, citing *Andrew G. Nelson, Inc. v. United States*, 355 U.S. 554 and *Malone Freight Lines, Inc. v. United States*, 107 F. Supp. 946, held:

> The interpretation of the commodities authorized to be transported by a certificate is left largely to the discretion of the Commission, and its construction is controlling unless clearly erroneous, arbitrary, an abuse of discretion or in contravention of some established principle of law. (J.S. App. A., 2a).

No additional restriction has been imposed upon the Whitehouse certificate as a result of the investigation instituted by the Commission. Rather, under the authority of Sections 204(c) and 212(a) of the Interstate Commerce Act (hereinafter referred to as the Act), 49 U.S.C. Sections 304(c) 49 Stat. 546 and 312(a), 49 Stat. 558, the Commission sought to determine whether Whitehouse, in violation of Section 206(a) of the Act, 49 U.S.C. 306(a), 49 Stat. 551, had been transporting commodities as a common carrier by motor vehicle, not authorized by its certificate

numbers MC-106760 (Sub-Nos. 5, 26, 41, 45 and 46), and especially that portion of its authority held under Sub-No. 45. By interpreting Whitehouse's certificate the Commission did not restrict, modify, alter or revoke any portion of the certificate, but rather clearly indicated what rights Whitehouse had from the beginning. *Malone Freight Lines, Inc. v. United States; supra.*

1. The interpretation of a certificate issued by the Commission is a question solely for that agency, *Service Storage & Transfer Co. v. Virginia,* 359 U.S. 171, and, unless such interpretation is clearly erroneous, it is controlling on the courts, *Andrew G. Nelson, Inc. v. United States,* 355 U.S. 554. In proceedings instituted under Section 204(c) and 212(a) of the Act the Commission is the administrative body charged with the interpretation of certificates of its own creation. In *J. B. Action, Inc. v. United States,* 221 F. Supp. 174, the court pointed out the formidable expertise of the Commission in the interpretation of its own certificates. (J.S. App. A). It is the obligation of the court to recognize the Commission's skill and judgment in its field, and as such, it is not for the court to examine the entire record in the case in order to determine whether the court would have arrived at the same conclusion as the Commission did. *Columbia Transportation Co. v. United States,* 167 F. Supp. 5. The district court reiterated this long established principle and found:

> The interpretation of the commodities authorized to be transported by a certificate is left largely to the discretion of the Commission, and its construction is controlling unless clearly erroneous, arbitrary, an abuse of discretion or in contravention of some established principle of law. We have carefully examined the pleadings, briefs and oral argument of all the parties in this case, as well as the opinion of

> the Commission and cannot say that the findings of the Commission are clearly erroneous. . . . Furthermore, the manner in which the intended use test was applied by the Commission in this case was not an abuse of discretion. (Citations omitted) (J.S. App., A., 2a-3a).

2. Appellant erroneously contends (J.S. 6-7) that the Commission's interpretation, as upheld by the district court, lessened the involved authority by adoption of a subsequently adopted policy. In November, 1962, Appellant purchased the authority involved from Commercial Carriers, Inc. which had at all times limited the scope of its authority to the transportation of prefabricated houses or buildings. The Commission specifically stated:

> As noted previously, the operations conducted by respondent's predecessor predominantly consisted of transportation of prefabricated houses or buildings and some shipments of components of such prefabricated buildings. Clearly, there was no intent that the authority purchased should embrace unrestricted authority to transport all "building material" regardless of their intended use and it fairly appears that the purchase price paid was significantly related only to authority to transport prefabricated houses and buildings and the components necessary for their completion. Compare *Consolidated Copperstate Lines, Inc. v. Navajo Freight*, 92 M.C.C. 516, 519. (J.S. App. B., 16a).

A new commodity description for "building materials" was not issued after Commercial Carriers, Inc., appellant's predecessor, received the certificate in 1947. The Commission in *William McDade Interpretation of Certificate*, 53 M.C.C. 401, construed "building materials" authority granted in 1941. In addition, the Commission's interpretations and distinctions of and between "building materials" and "prefabricated building" authority have been rendered

prior to appellant's purchase of this certificate and said interpretations and distinctions affect all outstanding certificates. See, *Descriptions* in *Motor Carrier Certificates*, 61 M.C.C. 209.

3. Appellant contends that the district court misconstrued the rule established in *Andrew G. Nelson, Inc. v. United States*, 355 U.S. 554 by placing a restriction on appellant's unambiguous certificate. It is submitted that the *Nelson* case was properly applied inasmuch as the district court upheld the tests applied by the Commission which are no longer open to question. Appellant confuses an "interpretation" of a certificate with a "restriction" of a certificate. The district court upheld the Commission's use of the "intended use" test. (J.S. App. A, 3a).* In applying the "intended use" test, the Commission merely maintained its entrenched practice of distinguishing "building material" authority from "prefabricated houses and buildings" as a restrictive term having a definite meaning in transportation parlance, and that the words employed were to be given their trade or technical meaning. *Interstate Commerce Commission v. Black*, 6 Fed. Car. Cases ¶80,466 (N.D. Ga. 1947), *aff'd.*, 167 F.2d 825 (C.C.A. 5th Cir. 1948).

Further, in *Malone Freight Lines, Inc. v. United States*, *supra*, at 951 the Court stated:

> It is not felt that Title 49 U.S.C.A. Section 312, Interstate Commerce Act, Part II, Section 212, providing for the revocation of a certificate, is applicable, and to apply it would be to assume the Plaintiff's contention of the issue, namely, that the contested operations were authorized by the certificate and revoked by the Commission's order. The

* See also, C & H Transportation Co., Interpretation of Certificates, 62 M.C.C. 587, approving use of the "intended use" test.

Commission's interpretation of the certificate never included the finding that these operations were authorized and thus it could not revoke authority that never existed.

The Commission held that "The terms are used in the context of this Commission's functions and usage of transportation terminology (J.S. App. B., 11a)." Such a finding is not clearly erroneous, capricious, arbitrary or an abuse of discretion and in no way diminishes the authority held by appellant.

CONCLUSION

The district court's decision is clearly correct and no substantial question is presented by this appeal. It is respectfully submitted that the judgment be affirmed.

Respectfully submitted,

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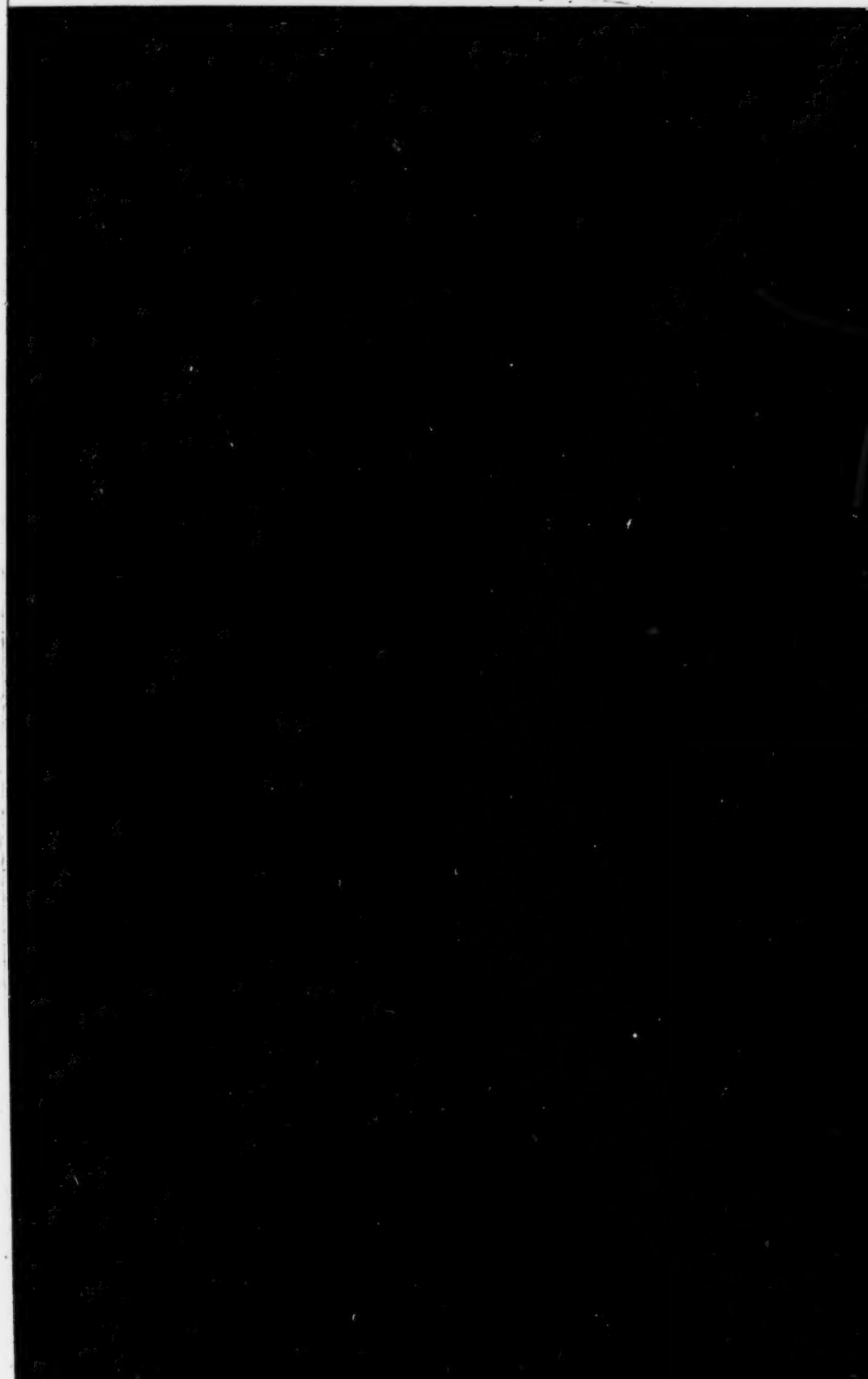
May, 1967.



In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1255

WHITEHOUSE TRUCKING, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

MOTION TO AFFIRM

Pursuant to Rule 16 1(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. A., 261 F. Supp. 9) dismissing appellant's action brought to set aside an order of the Interstate Commerce Commission (J.S. App. B., 99 M.C.C. 621).

Appellant, a motor common carrier, is authorized

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by its certificate of public convenience and necessity[1] to transport "prefabricated houses and buildings, prefabricated house and building sections, [and] prefabricated house and building panels, with parts and accessories," between points in 18 States (J.S. App. A., 2a). In 1964, the Commission, on its own motion, instituted an investigation to determine whether appellant was operating outside the scope of its authority (J.S. App. A., 1a). Appellant stipulated that it had transported some 41 shipments of general building materials (*e.g.*, insulation, pipe and wallboard), but offered no evidence that they were intended for use in prefabricated buildings (J.S. App. B., 8a). Appellant's president testified to his view that appellant could transport commodities such as nails whenever they were intended for use in any building, without restriction to prefabricated buildings (Transcript of record, p. 69). The Commission, overruling its examiner,[2] found that the certificate, when read as a whole, clearly limited appellant to transporting commodities intended for use in a prefabricated house or building and that appellant's interpretation was not only contrary to the "functions and usage of trans-

[1] The certificate was initially issued (under Section 207 of the Interstate Commerce Act, 49 U.S.C. 307) in 1947 to appellant's predecessor (J.S. App. B., 15a, n.). After the Commission's approval of the purchase of this certificate by appellant, it was reissued to appellant, on January 25, 1963 (J.S. App. B., 3a).

[2] The Commission's hearing examiner found that appellant's certificate permitted transportation of prefabricated parts and accessories whether or not they were intended to be used in prefabricated houses.

portation terminology" but was tantamount to a claim that it was authorized to transport "building materials" (J.S. App. B., 11a)—contrary to the long-standing administrative distinction between "prefabricated building" authority and "building material" authority (J.S. App. B., 12a–14a).[3]

The three-judge district court sustained the Commission in a *per curiam* decision (J.S. App. A., 3a).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The district court, upon a careful examination of the administrative record, correctly held that the Commission's interpretation of the commodity description in the particular certificate of public convenience and necessity was reasonable and not an abuse of discretion (J.S. App. A., 3a). The interpretation of a certificate issued by the Commission is primarily a question for that agency, *Service Storage & Transfer Co.* v. *Virginia,* 359 U.S. 171, and unless its interpretation is clearly erroneous it is binding on the courts. *Nelson, Inc.* v. *United States,* 355 U.S. 554. As the district court held (J.S. App. A., 3a,), the Commission's "expertise [in construing its own certificates] is formi-

[3] The Commission also observed that the original application of appellant's predecessor had been supported only by prefabricated house and building manufacturers (J.S. App. B., 15a) and that appellant's predecessor had transported the commodities in question only when they were intended for use in prefabricated houses and buildings (J.S. App. A., 3a, App. B., 16a).

dable and cannot be lightly regarded by the reviewing courts."

Contrary to appellant's contention (J.S. 5), the Commission did not diminish appellant's authority by application of a "subsequently adopted policy" of creating a new commodity description of "building materials" after appellant's predecessor received the certificate. The Commission's long-standing distinction between "building material" authority and "prefabricated building" authority predated by many years the issuance in 1947 of appellant's certificate. Indeed, "building material" authority has been granted since the inception of motor carrier regulation. Cf. *William McDade Interpretation of Certificate,* 53 M.C.C. 401, construing, as pertinent, "building materials" authority granted in 1941. *Descriptions in Motor Carrier Certificates,* 61 M.C.C. 209, did not announce the policy for the first time in 1952, as appellant contends (J.S. 5); it merely restated the preexisting rule. Finally, we stress, the "intended-use" test that the Commission applied to appellant's certificate has been upheld by this Court. *Nelson, Inc.* v. *United States, supra.* Its application to the present certificate merely continued the long-standing distinction between "building material" and "prefabricated house" authority.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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Interstate Commerce Commission.
MAY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

IN THE

Supreme Court of the United States

October Term, 1966

No. 1255

WHITEHOUSE TRUCKING, INC.,
Appellant,

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

APPELLANT'S BRIEF OPPOSING MOTIONS TO AFFIRM

Three motions to affirm the judgment appealed from herein have been filed on the ground that no substantial question is presented by this appeal. In essence, the single question raised by this appeal is whether the Commission may disregard the unambiguous language of a certificate issued pursuant to the Interstate Commerce Act on the basis of subsequently adopted Commission policy.

In addition to the reasons set out in Appellant's Jurisdictional Statement, the substantiality of the question presented is further indicated by the fact that the arguments advanced in support of the Motions To Affirm exhibit two major deficiencies.

I.

There is a complete absence from the arguments in support of the Motions of any meaningful discussion of the fact that the unambiguous language of the certificate involved cannot as a matter of plain English be squared with the Commission's "interpretation" thereof. The common weakness which underlies each of the various contentions advanced by the movants is the implicit conclusion that the language of the certificate is consistent with the Commission's "interpretation". There is a complete absence from the Commission's order and the underlying record of any basis either in ordinary English usage or in special trade usage for the Commission's "interpretation" of the language of the certificate. Once the uncontroverted record fact that the Commission has disregarded the plain English meaning of the certificate involved is recognized, it is apparent that a substantial issue is presented. The various contentions advanced in support of the Motions To Affirm miss the point because they are predicated on an erroneous premise which assumes the answer to the very question that is presented.

II.

It is asserted in support of the Motions To Affirm that the judgment appealed from is clearly supported by a definite Commission policy against granting certificates which authorize transportation of both prefabricated buildings and other specified prefabricated commodities which come under the broader generic description "building materials". It is not explained how any such a policy could derogate from the plain and unambiguous grant of a certificate. Moreover, there is no evidence in the record or the Commission's order of any such policy. While the terms "prefabricated buildings" and "building materials" have

been employed by the Commission for many years and obviously refer to distinctly different commodities, there has not heretofore been any announced Commission policy against combining in a single certificate authority to transport prefabricated buildings with authority to transport other prefabricated commodities.* If the Commission had intended to grant authority only to transport "prefabricated buildings and component parts thereof" it would have granted a certificate stating precisely that. The Commission's action in granting more is at odds with the contention that there existed a Commission policy against doing so. In sum, the movants' reliance upon a purported Commission policy which is not established by the record to justify modification of the plain language of a certificate indicates that this appeal, indeed, raises a substantial question under the Interstate Commerce Act which has far reaching implications with respect to the maintenance of stability in the transportation industry and preservation of the statutory scheme embodied in the Act.**

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* The combination of authority to transport commodities such as prefabricated buildings with authority to transport other commodities falling within the generic classification "building materials" in a single certificate is not unprecedented. See *e.g. Pre-Fab Transit Co. v. United States*, 13 *Federal Carriers Cases*, Paragraph 81,215 (S.D. Ill. 1958) (not officially reported).

** The Motions To Affirm contain various contentions and factual statements which Appellant disputes, but which are appropriate for discussion in a definitive brief on the merits rather than within the limited confines of this brief.

CONCLUSION

The Motions To Affirm the judgment of the District Court should be denied.

Respectfully submitted,

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Of Counsel

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

WHITEHOUSE TRUCKING, INC. *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

No. 1255. Decided June 12, 1967.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.